

COMMON LEGAL ISSUES AND HELPFUL DOCUMENTS FOR CAREGIVERS AND CARE RECIPIENTS

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WILLS

- A will is the foundation of planning for anyone and everyone
- Everyone should have a will, even if you don't have much
- If you die without a will, you may lose control of how your estate and assets are distributed
- Talking about a will can be difficult because it requires us to contemplate our death, or the death of a loved one
- Although there are lots of “do it yourself” resources to draft your will, I recommend having a lawyer prepare it.

WHAT IS A WILL?

- A written legal document that states what you want done about various topics after you die. A will can include your wishes about what happens to your belongings (called the "estate"), and about who will care for any minor children.
- When you make a will, you are called the "testator." In the will, you should state who you want to carry out the instructions in the will. That person is called the "personal representative." Sometimes that person is also called the "executor." A person who receives a gift from your estate is called a "beneficiary."

EXECUTING A WILL

- No legal effect until properly signed and witnessed
- Estates and Trusts Article §§4-101 to 4-107 governs the proper execution of a will in Maryland.
- Maryland law requires only that the will be in writing, signed by the testator and witnessed by two individuals in the testator's presence. This is called "executing a will."
- When you are ready to execute your Will, you should have at least two disinterested witnesses, although three is preferable.

WHAT IF I DIE WITHOUT A WILL?

- If this happens, money and other property you own at death is divided and distributed according to "intestate succession" laws of the state
- These laws may not reflect your wishes. For example, if you are married and have no children, Maryland law requires your spouse to share your property with your parents
- Intestate succession laws don't deal with the question of who will take care of minor children if both parents die or if the surviving parent is unavailable, leaving it up to the courts and social service agencies to appoint a guardian.

REQUIREMENT OF “SOUND MIND”

Sound mind is having the mental capacity to make a valid will. This generally means that you:

- Understand what a will is, what a will accomplishes, and that you are making one.
- Understand the relationship between yourself and others such as your spouse, whom you would normally include in your will.
- Understand what property you own.

MODIFYING YOUR WILL – WHEN?

- If the property you own changes significantly and you made specific gifts of that property
- If your marital status changes
- If you adopt or have additional children
- If your child dies, leaving children
- If you move to a different state
- If any of your beneficiaries die
- If the person you name as personal guardian for your minor children or manager for their property is no longer able to serve
- If the person named as your personal representative (executor) is no longer able to serve
- If you change your mind about the provisions in your prior Will
- If your witnesses move away, die or are no longer competent. (A new Will is not necessary if you have made your Will Self-proving)
- Your Will is valid until revoked. You can revoke a Will by making a new Will. Your Will can also be revoked if it is destroyed

POWERS OF ATTORNEY

- A “power of attorney” is a document that gives someone legal authority to act for another person. It allows you to assign a person to manage your affairs if you are unable to do so
- The person granting power of attorney is the “principal”
- The person given the power is known as the “agent” or “attorney-in-fact”
- The document defines the limits of the power that the principal is giving to the agent
- The power of attorney does not take away the principal’s power to act; it only gives the agent the power to act for the principal

STATUTORY POWERS OF ATTORNEY

- Any writing or other record that grants authority to a person to act for another person will be read as a power of attorney. A power of attorney need not say “power of attorney” on it.
- The Maryland General and Limited Power of Attorney Act created a specific kind of power of attorney called a “statutory form power of attorney.” There are several templates in the law (links at end)
- If a person refuses to honor a statutory power of attorney, that person may be held liable for the attorney's fees incurred to get a court order that requires them to abide by the power of attorney
- Relevant law: the Maryland General and Limited Power of Attorney Act (Maryland Code, Estates & Trusts, §§17-101 through 17-204)

GENERAL vs. LIMITED P.O.A.

- GENERAL POA- gives a person power and authority to act for the principal in all business and personal matters.
 - Examples: opening & closing bank accounts, buying & selling stock, accessing safe deposit boxes, taking out loans, purchasing real estate, suing, and entering into contracts in the name of the principal.
- LIMITED POA grants to the person only powers defined in the document.
 - Often used to give agents the power to act in financial matters, to manage real estate, or to make healthcare decisions for the principal when the principal loses the ability to make decisions for himself.
 - Medical powers of attorney are called ***advance directives*** (more later)
 - May be limited either by the scope of powers that the agent receives or by time.

WHO MAY CREATE A P.O.A.?

- Requirements to create a power of attorney:
 - Must be at least 18 years old
 - Must intend to give the power to the person designated in the document
 - Must be mentally competent, meaning able to understand:
 - the document;
 - which powers are being granted; AND
 - which property is affected by the power granted

WRITTEN POA's ASSUMED DURABLE

- In Maryland, a written power of attorney is assumed to be a "durable" power of attorney unless the document says that it is not.
- A conventional power of attorney ends when the principal becomes too disabled to make decisions for himself.
- But a **durable** power of attorney does not end when the principal becomes disabled
- Relevant law: Maryland Code, Estates and Trusts § 17-105

WHEN DOES A POA GO INTO EFFECT?

- Normally, a POA goes into effect as soon as the principal signs it.
- However, a "springing" power of attorney gives the agent power to act for the principal only *after* a certain event, such as when the principal becomes disabled
 - The wording of the POA must be very specific so that there is no question about what counts as an event that matches the requirements of the power of attorney
 - The principal may authorize someone to say whether the event making the power effective has happened
 - If the power of attorney is supposed to go into effect when the person becomes sick or hurt and no one has been authorized to make the determination, then a doctor or a judge may make the determination

POWERS & DUTIES OF A PERSON W/POA

- The POA should describe the powers of the agent. If there is a question about the limits of the agent's powers, then the principal, agent, guardian of the principal, principal's family member, or a government agency may petition a court to decide what power the agent has
- An agent is required to act in the best interest of the principal. The agent must do what they think the principal would want them to do, to the best of the agent's ability
- Agents must keep a record of all receipts and transactions made for the principal. Agents must act loyally for the benefit of the principal's best interest and cooperate with the person who is empowered to make health-care decisions for the principal if there is one
- Agent has a right to reimbursement for reasonable expenses paid while acting for the principal, but no right to payment beyond that unless included in the POA

ENDING A POWER OF ATTORNEY

A power of attorney may ends when:

- the principal dies (when the agent learns of the principal's death);
- the principal becomes incapacitated (unless the POA is durable);
- the principal revokes the POA of attorney;
- the power of attorney provides that it terminates;
- the purpose of the power of attorney is accomplished; OR
- the agent dies, becomes incapacitated, or resigns, and the POA does not provide for another agent to act under the POA.

MEDICAL POAs/ADVANCE DIRECTIVES

- Any competent person may create a POA to give someone the power to make healthcare decisions for him in case something happens. These documents are called advanced directives. The Maryland Health Care Decision Act governs advance directives.
- Under the Maryland Health Care Decision Act, the person the principal appoints to make healthcare decisions is called a “health care agent.” An owner, operator or employee of the healthcare facility providing care to the principal cannot usually serve as the healthcare agent unless the person was selected as the healthcare agent *before* the facility began care of the principal.
- Relevant laws: MD Health- General § 5-601, MD Health- General § 5-602

ADVANCED DIRECTIVES (cont'd.)

- An advance directive can be either a written or electronic document. It must be signed, dated, and witnessed by two witnesses. It is the responsibility of the person who wants his/her advance directive honored to tell his/her doctor about it. Anyone except the healthcare agent may serve as a witness.
- Unless otherwise stated in the advance directive, the directive goes into effect when the person becomes too sick to make a decision about his care. If the patient is unconscious or not able to communicate, then the attending doctor may make the determination that the advance directive is in effect. Otherwise two doctors must certify that the patient is not capable of making an informed decision about care.
- Maryland Health-General § 5-603 provides a sample form for an advanced directive. It includes provisions for selecting a health care agent, selecting powers of the agent, making a living will and preferences for treatment, and organ donation.

NOTE ON ORAL ADVANCE DIRECTIVES

- Law does provide for oral advance directives
- Patient must give the oral Advance Directive voluntarily
- Patient must be competent to give the oral statement intending it to be an Advance Directive
- The oral Advance Directive must be made in presence of the attending physician and at least one witness
- The oral Advance Directive must be documented in the person's medical record and was dated and signed by the physician and the witness

OTHER DOCUMENTS/PLANNING MEASURES

- Reverse Mortgages
- Living Trusts
- Medicaid Trusts
- Long Term Care Insurance
- Spending down assets/gifting during life
- Deed transfers

Resources and helpful links

- Maryland Limited POA form: <https://www.peoples-law.org/maryland-limited-power-attorney-form>
- Maryland Statutory POA form: <http://www.marylandattorneygeneral.gov/Courts%20Documents/17-202.pdf>
- Maryland Advance Directive Forms (available in Word and fillable PDF formats, with excellent FAQ's and instructions): <http://www.marylandattorneygeneral.gov/Pages/HealthPolicy/AdvanceDirectives.aspx>
- Resources for low/reduced cost Wills and POAs (income eligibility applies): -
Maryland Volunteer Lawyers Service - <https://mvlslaw.org/>
Maryland Legal Aid: <https://www.mdlab.org/>
- Maryland Courts Self Help Centers: <https://mdcourts.gov/selfhelp>

THANK YOU!

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